88-1678

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

RICHARD WALTON,
Petitioner,

VS.

SCOTT B. MERRIMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE A. REINHOLTSEN, ESQ.*
JOHN M. VRIEZE, ESQ.
MITCHELL, DEDEKAM & ANGELL
P.O. Box 1001
814 Seventh Street
(707) 443-5643
Eureka, California 95501
Attorneys for Petitioner

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

1. Whether the court below erred in analyzing an officer's qualified immunity by not considering any of the clearly established, factually similar federal or state law in effect on July 17, 1986, as required by *Anderson v. Creighton,* 483 U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), when it ruled that no reasonable police officer could have believed there was probable cause to effect a warrantless arrest after an eyewitness reported a kidnapping.

2. Whether the court below erred by not considering all the information possessed by the arresting officer, as required by *Anderson.*

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OCTOBER TERM, 1988

RICHARD WALTON,
Petitioner,

VS.

SCOTT B. MERRIMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Richard Walton, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 7, 1988.

OPINION BELOW

The opinion of the Court of Appeals, reported at 856 F.2d 1333 (9th Cir. 1988), appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 7, 1988. A timely petition for rehearing *en banc* was denied on January 13, 1989, and this petition for writ

of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> § 1983. *Civil Action for Deprivation of Rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

Scott B. Merriman was arrested by petitioner Richard Walton, a Deputy Sheriff employed by the Sheriff's Department of Humboldt County, California, on suspicion of having kidnapped Wendy Cantrell. (CR 24)[1] The Humboldt County Sheriff's Department first received information of the kidnapping at about 11:00 p.m. on July 16, 1986, when Ms. Cantrell's half-brother, William Ivey, telephoned the Sheriff's Department. (*Id.*)

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[1] All citations are to the Clerk's Record before the Ninth Circuit Court of Appeals.

Deputy Richard Walton was dispatched to Ivey's residence. (*Id.*) Mr. Ivey told Deputy Walton that he had received a phone call from Ms. Cantrell's friend, Kim Martinez, and that Ms. Martinez had told him the following: Earlier that evening, she and Ms. Cantrell were together at the Clam Beach Inn, where they initially were confronted by Mr. Merriman. (CR 41) The two women left and Merriman followed their automobile until it stopped. (*Id.*) He then dragged Ms. Cantrell out of the vehicle. Ms. Cantrell kicked and screamed and directed Ms. Martinez to call the police. (*Id.*) Mr. Merriman then told Ms. Martinez, "You can call whoever you want, I've got keys to the cabin and that's where I'm taking her." (*Id.*)

Just before midnight on July 16, 1986, Sergeant James Marler contacted Ms. Martinez by telephone. (CR 23) She was coherent and very concerned about Ms. Cantrell's welfare. (*Id.*) Ms. Martinez told Sergeant Marler she and Ms. Cantrell had been driving her car near Clam Beach. (*Id.*) She stopped the car so that Ms. Cantrell could speak with her ex-boyfriend, Scott Merriman. (*Id.*) As they were talking, she observed Mr. Merriman take hold of Ms. Cantrell's arm and start pulling her toward his car. (*Id.*) She heard Mr. Merriman say he was going to take her to "the cabin," and she then heard Ms. Cantrell say she did not want to go. (*Id.*) Ms. Cantrell yelled to Ms. Martinez, telling her to get Merriman's license number and to call the police. (*Id.*)

After receiving the information from Ms. Martinez, either Sergeant Marler or the office radio dispatcher informed Deputy Walton that the eyewitness had verified the kidnapping. (CR 24) Deputy Walton had no reason to disbelieve the reported information. (*Id.*)

Prior to going off duty at 2:00 a.m., Deputy Walton checked Merriman's residence. (*Id.*) Merriman's car was not there and the house was unoccupied. (*Id.*) Because neither Merriman nor Ms. Cantrell could be found, he requested a county-wide all points bulletin. (*Id.*)

Deputy Walton returned to work at about 4:00 p.m. on July 17, 1986. (*Id.*) He learned that earlier in the morning Officer Kirkpatrick had been unable to locate either Mr. Merriman or

Ms. Cantrell. (*Id.*) Deputy Walton was also advised that Merriman had contacted the Sheriff's Office and informed them he would be at his residence after 5:00 p.m. (*Id.*)

Deputy Walton went to Merriman's residence and he was not there. (*Id.*) He then went to Mr. Ivey's residence, and Mr. Ivey told him the following: Mr. Ivey had seen his sister at about noon on that day. (CR 41) Her nose was scratched and she had a cut over her eye. She said she had spent the night at a cabin at Elaine Howell's, she had been "messed up on booze and drugs," and she did not remember what happened. (*Id.*) Ms. Cantrell left at about 2:00 p.m. without saying where she was going. (*Id.*)

After speaking with Mr. Ivey, Deputy Walton went to Ms. Howell's residence. (CR 24) Ms. Howell told him Merriman was inside and she invited him in. (*Id.*) While talking with Deputy Walton, Merriman admitted spending the night with Ms. Cantrell at a vacant house located below the Howell residence. (*Id.*) He admitted to closely following Ms. Martinez and Ms. Cantrell after they left the Clam Beach Inn, and he admitted that he told Ms. Cantrell to get into his car, although he claimed Ms. Cantrell had done this voluntarily. (*Id.*) Mr. Merriman stated that Ms. Cantrell and Ms. Martinez had been fighting. (*Id.*)

Deputy Walton then arrested Mr. Merriman for kidnapping. (*Id.*) At that time, Deputy Walton had been unable to find Ms. Cantrell and he knew of no one from the sheriff's department who had contacted her. (*Id.*)

Merriman was booked into the Humboldt County Jail at approximately 6:15 p.m. on July 17, 1986. On July 18, 1986, Detective Vulich of the Humboldt County Sheriff's Department received a call from Ms. Cantrell at about 3:25 p.m. (CR 25, Ex. A) She stated she "did not want to pursue prosecution" and said she would get a restraining order to keep Merriman away from her.[2] (*Id.*) Detective Vulich discussed the matter with a

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[2] Ms. Cantrell claimed at her deposition that she contacted the sheriff's department at about 2:00 p.m. on July 17, 1986, informing them that she had not been kidnapped but stating she would seek a restraining order to keep Merriman away from her.

deputy district attorney and the decision was made to release Merriman. (*Id.*) He was thereafter released from the Humboldt County Jail on July 18, 1986. (CR 43)

Mr. Merriman sued Deputy Walton, Deputy Marler, Humboldt County Sheriff Dave Renner, and Humboldt County, seeking compensatory and punitive damages. (CR 1) Mr. Merriman alleged violation of 42 U.S.C. § 1983 (1982), claiming his warrantless arrest was made without probable cause and claiming the county had a custom and policy of permitting unlawful arrests. (*Id.*)

All defendants moved for summary judgment, arguing the defendant officers had probable cause and, alternatively, that the defendant officers were entitled to judgment based upon qualified immunity. (CR 19-26) Without discussion of the law or facts, the district court denied defendants' motion, finding the existence of triable issues of fact. (CR 44)

The question of qualified immunity was appealed. The Ninth Circuit Court of Appeals affirmed the district court's ruling, stating a reasonable police officer, knowing what Walton knew, could not have believed there was probable cause for Merriman's warrantless arrest. The court analyzed the "totality-of-the-circumstances" to determine the existence of probable cause, citing *Illinois v. Gates* 462 U.S. 213, 238 (1983). However, the court failed to consider any factually similar federal or state law in order to ascertain the clearly established law for warrantless arrests based upon the report of an eyewitness. Further, the court did not consider the fact that Ms. Cantrell returned home with a cut over her eye and a scratched nose, thereby appearing to be a victim of violence.

Defendants thereafter filed a timely petition for rehearing *en banc*. This petition drew the court's attention to the omission of a material fact from its opinion—that Ms. Cantrell appeared injured when she briefly returned home after the alleged kidnapping. The petition also raised the fact that the court overlooked "clearly established law" holding that an eyewitness to a crime is considered a reliable informant for the purpose of establishing probable cause for a warrantless arrest, even though that person's

reliability has not been proven or tested. Defendant's petition for rehearing was denied January 13, 1989.

Merriman then filed a motion for summary judgment on the issue of liability, basing the motion upon the decision of the Ninth Circuit in the case. He contended that the Ninth Circuit determined, as a matter of law, that there was no probable cause for the arrest and summary judgment in his favor was mandated. The district court deferred to the opinion of the Ninth Circuit and granted Merriman summary judgment against Deputy Walton on the issue of liability, stating the following:

> The Ninth Circuit therefore asked itself this question: Could a reasonable police officer have believed that he was not violating clearly established law, i.e., that probable cause did exist? In order to rule on this matter, the court had to determine the clearly established law. This in turn resulted in a finding that, in the circumstances of this case, it was clearly established law that probable cause to arrest did not exist. (*Id.*)
>
> Defendants, in attempting to show a dispute exists over material facts, refer to case law which they assert establishes probable cause under similar factual circumstances as those alleged by defendant. However, in *Merriman,* the Ninth Circuit, with all disputed and undisputed facts before it, established that there could be no probable cause in *these exact* circumstances. Needless to say, the court must find *Merriman* more persuasive than other authority cited by defendant. It should be added that, since then, no new exculpatory evidence has been offered by defendant Walton.
>
> Defendants do point to one circumstance, which was in the record, which they claim was not considered by the Ninth Circuit in its opinion. They assert that defendant Walton had some indication that Ms. Cantrell, the alleged victim, was injured the night before. However, under the standard for probable cause established by the Ninth Circuit in *Merriman,* this court finds such a fact to be immaterial. Moreover, since the Ninth Circuit made its finding as to probable cause with the full record before it, any information which did not appear in their discussion of the case only

further indicates its immateriality as to the standard established for probable cause.[3]

In addition to granting plaintiff summary judgment against Deputy Walton on the issue of liability, the district court granted defendant's motion to vacate the trial date pending this court's decision on granting certiorari.

ARGUMENT

1. THE COURT BELOW FAILED TO CONSIDER THE "CLEARLY ESTABLISHED LAW," AS REQUIRED BY *ANDERSON V. CREIGHTON*, WHEN IT RULED DEPUTY WALTON WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

In *Anderson v. Creighton*, 483 U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court of the United States advanced a two-step legal analysis for determining whether a governmental official is entitled to qualified immunity. First, the reviewing court must determine whether, at the time of the alleged incident, the right an official is alleged to have violated was "clearly established." *Anderson, supra*, 97 L.Ed.2d at 531. Whether a right is "clearly established" must be considered in a particularized and relevant sense, rather than at a level of generality only addressing abstract rights. *Anderson, supra*, 97 L.Ed.2d at 530-531.

Once a court has determined the clearly established law, the second step in the analysis is the "objective (albeit fact-specific) question" whether a reasonable officer could have believed [the action was lawful], in light of clearly established law and the information possessed by the official. See *Anderson, supra*, 97 L.Ed.2d at 532.

To determine whether a right is clearly established, a court must review all available factually similar law in existence when the alleged right was violated. Without review of existing law, there is simply no way a reviewing court can determine whether

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[3] The district court's order was filed March 17, 1989.

the unlawfulness of an official's conduct would be apparent to a reasonable official. See, e.g., *Anderson, supra*, 97 L.Ed.2d at 531. The Ninth Circuit Court of Appeals has adopted this procedure in cases not involving warrantless arrests based upon an eyewitness report. See, *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988); *Vaughan v. Ricketts*, 859 F.2d 736 (9th Cir. 1988); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988). *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987) ("[I]n the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts to determine whether the right was clearly established."). Other courts of appeals have also closely scrutinized the existing established law. See, *Alvarado v. Picur*, 859 F.2d 448 (7th Cir. 1988); *Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987).[4]

In the instant case, the court below did little more than assert a general, abstract right to be free except upon showing of probable cause to arrest. The court's sole review of preexisting law was limited to defining the probable cause standard, as follows:

> "Probable cause is determined by applying a 'totality-of-the-circumstances' analysis. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause requires 'a probability or substantial chance of criminal activity.'" (*Id.* at 243 n. 13.) (See, p. A- 4 of Appendix hereto.)

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[4] There is a conflict between the circuits as to who bears the burden of showing that the law was clearly established. The Ninth Circuit places the burden of proof on the good faith immunity upon the defendant. *Guerra v. Sutton*, 783 F.2d 1372, 1374 (9th Cir. 1986). Other Circuit Courts of Appeal take the position that once a defendant properly raises the issue of qualified immunity, plaintiff has the burden of showing that the law was clearly established. *Hynson v. City of Chester*, 827 F.2d 932 (3rd Cir. 1987), cert. denied, 108 S.Ct. 702 (1988); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); *Dominique v. Telb*, 831 F.2d 637 (6th Cir. 1987); *Alvarado v. Picur*, 859 F.2d 448 (7th Cir. 1988); *Lutz v. Weld County School District*, 784 F.2d 340 (10th Cir. 1986).

The court failed to consider numerous cases decided before July 17, 1986, both state and federal, which have held that information furnished by an eyewitness or victim is generally sufficient to establish probable cause, even though that person's reliability has not been proven. See, *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984)*†;[5] *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973), aff'g. 354 F.Supp. 179 (E.D. Mo. 1973)†; *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986)†; *Easton v. City of Boulder, Colo.*, 776 F.2d 1441 (10th Cir. 1985), cert. denied, ____ U.S. ____, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986)†; *Goodson v. City of Atlanta, Ga.*, 763 F.2d 1381 (11th Cir. 1985), rehg. den., 770 F.2d 175 (1985)†; *Peo. v. Bevins*, 6 Cal.App.3d 421 (1970)*†; *Peo. v. Gardner*, 252 Cal.App.2d 320 (1967)*†. Further, California Penal Code § 836* provides that a police officer may make a warrantless arrest "whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Based upon the foregoing clearly established law, the eyewitness report of Kim Martinez concerning the kidnapping and the eyewitness report of William Ivey concerning Ms. Cantrell's physical condition soon after the kidnapping provided sufficient facts for a reasonable officer to find probable cause to arrest Merriman. Petitioner is aware of no case precedent preexisting Merriman's arrest clearly establishing that probable cause based upon the eyewitnesses' reports was vitiated because of other facts before the officer (i.e. that Cantrell briefly returned home not knowing what had happened the night before, that Merriman was cooperative, that Merriman denied taking Ms. Cantrell against her will.) [6]

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[5] The symbol "*" indicates cases and statutes cited by Petitioner in his appeal to the Ninth Circuit, and the symbol "†" indicates cases cited by Petitioner in his petition for rehearing.

[6] In *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987)†, which was decided after Merriman was arrested, the court held a victim's report of crime was sufficient to establish probable cause and probable cause was

Governmental officials are immune from suit unless the law clearly proscribed the action taken. *Davis v. Scherer,* 468 U.S. 183, 191, 104 S.Ct. 3012, ____, 82 L.Ed.2d 139, 147 (1984); *id.*, at 198, 104 S.Ct. 3012, 82 L.Ed.2d 139 (Brennan, J., concurring in part and dissenting in part). By overlooking the clearly established law, the Ninth Circuit has adopted a generalized, less stringent analysis for determining an officer's qualified immunity in cases alleging an arrest without probable cause in violation of a person's Fourth Amendment rights. Such a test bears no relationship to the "objective legal reasonableness" forming the touchstone of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 296 (1982).

The analysis used by the court below therefore violates the precept of *Anderson,* supra, and in the future will deny police officers of the full shield of qualified immunity.

Petitioner urges that had the Ninth Circuit considered the clearly established law, a reasonable officer, at a minimum, could have believed there was probable cause to arrest Merriman. Because the officer's action was not clearly unlawful, it is suggested that summary reversal is now in order.

2. THE COURT BELOW FAILED TO CONSIDER IN ITS OPINION ALL MATERIAL FACTS POSSESSED BY THE ARRESTING OFFICER.[7]

William Ivey told Deputy Walton that Wendy Cantrell had a cut over her eye and a scratched nose when she briefly returned home the day following the kidnapping. (CR 41) The Ninth Circuit did not include this important evidence of possible physi-

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not vitiated by an anonymous telephone tip inplicating another suspect or a telephone call from victim indicating she wanted to dismiss charges against alleged rapist.

[7] The court below also incorrectly recited facts in the case. Kim Martinez reported that Merriman was Cantrell's ex-boyfriend (CR 24); there is no evidence Deputy Walton knew Merriman was "Cantrell's long-time boyfriend." (See, infra, A-4) Further, there is no evidence Deputy Walton knew Merriman was "a local school teacher." (Id.) In fact, Merriman admitted at his deposition that he had no teaching credential and that he quit his teaching job in February 1985. (CR 42)

cal violence in its opinion, even though it was brought to the court's attention in Petitioner's brief on appeal and again in his petition for rehearing.

Thereafter, the district court granted Merriman partial summary judgment, after finding this evidence was immaterial under the standard for probable cause established by the Ninth Circuit. If so, the question is raised—how much evidence, of physical violence is necessary before an officer can arrest a suspect without fear of § 1983 liability, when the victim disappears as did Wendy Cantrell in the instant case?

The objective, fact-specific question whether an officer could have believed an arrest lawful is based upon the information possessed by the officer. *Anderson,* supra, at 97 L.Ed.2d 532. Petitioner respectfully suggests that evidence of violence is crucial to evaluating the objective reasonableness of an officer's actions and the Ninth Circuit erred by not including this evidence in its opinion.

3. THE DECISION BELOW WILL SIGNIFICANTLY IMPAIR POLICE OFFICERS IN THE DISCHARGE OF THEIR DUTIES, PARTICULARLY WHEN RESPONDING TO DOMESTIC DISPUTES.

The decision of the court below will have a far reaching effect upon all law enforcement officials throughout the Ninth Circuit, as well as elsewhere. If police officers cannot rely upon the reports of eyewitnesses or victims of crime in order to establish probable cause (the "clearly established" law before the opinion below was rendered), officers may fail to exercise their best judgment and make an arrest because of the threat of retaliatory lawsuits. In the realm of domestic violence, police officers are now exposed to civil liability for failing to arrest an alleged abuser, when the abuser thereafter inflicts further bodily injury or murders the innocent victim. See generally, *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Estate of Bailey by Oare v. County of York*, 768 F.3d 503 (3rd Cir. 1985); *Dudosh v. City of Allentown*, 665 Fed.Supp. 381 (E.D. Pa. 1987); *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D. Conn. 1984).

Uncorrected, the case below will thrust police officers into "no win" situations when responding to reports of domestic violence. Officers will face civil liability for arresting an alleged abuser who claims innocence, based upon the urgent call for help from an abused spouse or cohabitant, or the witness of such domestic abuse, where the victim later denies the assault in order to protect the suspect. Further, officers are exposed to potential liability for not arresting an alleged abuser who claims innocence, should the abuser injure or murder the victim at a later date.

Because both alleged abusers and victims of abuse can potentially sue a police officer for violation of their civil rights, it is exceedingly important that the courts analyze the issue of qualified immunity consistently and properly. To this end, *Anderson v. Creighton,* 483 U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), requires the lower courts to carefully scrutinize all factually similar federal and state law in existence at the time of the alleged violation of a constitutional right, whenever analyzing whether the law was sufficiently clear so that the unlawfulness of an officer's action is apparent. The failure of the Ninth Circuit to conduct the foregoing analysis at the proper level of specificity has effectively removed the shield of qualified immunity.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Ninth Circuit. It is respectfully suggested that summary reversal is in order.

Respectfully submitted,

MITCHELL, DEDEKAM & ANGELL

By JOHN M. VRIEZE, ESQ.
DALE A. REINHOLTSEN, ESQ.
Attorneys for Petitioner

April 11, 1989

Appendix A

Scott B. Merriman,
Plaintiff-Appellee,

v.

Richard Walton, Deputy Individually and in his capacity as a Deputy Sheriff for the County of Humboldt; Red Marler, Individually and in his official capacity as a Deputy Sheriff for the County of Humboldt; the County of Humboldt, State of California, Dave Renner, Sherif, in his official capacity as the Sheriff of Humboldt County, Defendants-Appellants.

No. 87-2382.

United States Court of Appeals,
Ninth Circuit,

Argued and Submitted April 11, 1988.

Decided Sept. 7, 1988.

John M. Vrieze, Mitchell, Dedekam & Angell, Eureka, Cal., for defendants-appellants.

Bernard C. De Paoli, Eureka, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before Goodwin, Schroeder and Poole, Circuit Judges.

Goodwin, Chief Judge:

Defendants, Humboldt County sheriff officers, appeal the order denying their motion for summary judgment based upon their qualified immunity to the plaintiff's § 1983 action for wrongful arrest. We affirm.

Scott B. Merriman was arrested by a Humboldt County deputy on suspicion of having kidnapped Wendy Cantrell, his long-time girlfriend. The information leading to the arrest began to flow at 11 p.m. on July 16, 1986. Cantrell's half-brother, William Ivey, telephoned the sheriffs' department to report that his sister possibly had been kidnapped. Deputy Richard Walton was dispatched to Ivey's house. Ivey told Walton that he had received a

phone call from Cantrell's friend, Kim Martinez, and that Martinez had told him the following: Earlier that evening, she and Cantrell were together at the Clam Beach Inn when Merriman arrived and argued with Cantrell. When Martinez and Cantrell drove away, Merriman followed their automobile until it stopped. Merriman and Cantrell then struggled, and, as he forced her into his car, she told Martinez to call the police. Just before midnight, Sgt. James Marler contacted Martinez, who repeated her report to him.

Deputy Walton then checked Merriman's residence, observing that Merriman's vehicle was gone and that the house was unoccupied. Based on the information he had received, and upon his inability to find Merriman and Cantrell, Walton that night requested an all-points bulletin to other officers. Walton's shift ended at 2 a.m.

The next morning, another deputy sheriff was unable to locate either Merriman or Cantrell at either of their residences or at the elementary school where Merriman was a teacher. When Walton arrived at work around 4 p.m. that afternoon, he was advised that Merriman had phoned the sheriffs' department and told them that he would be at his residence after 5 p.m. Walton went to Merriman's home but did not find Merriman. Walton then went to Ivey's residence. Ivey told Walton that Cantrell had returned. Ivey repeated to Walton what Cantrell had told him, including her statement that she had spent the night at a cabin owned by Elaine Howell. Ivey said that Cantrell had told him that "she had been messed up on booze and drugs the night before and that she did not remember what had happened." He said that Cantrell had told him that she believed that there was an outstanding warrant for her arrest and that she had called a friend and left home around 2 p.m. without telling him where she was going.

Walton next proceeded to Howell's residence, where he saw Merriman's vehicle. Howell told him that Merriman was inside and invited him in. Merriman told Walton that he had followed Cantrell and Martinez and that the two women had gotten into a fight, which he had broken up. Merriman said that Cantrell voluntarily got into his car and that they had spent the night together. Walton then arrested Merriman. At that time, Walton

said, he knew of no one from the sheriffs' department who had contacted Cantrell. (Cantrell later made an uncorroborated statement that she called the sheriffs' department at about 2 p.m. that afternoon—in the presence of her mother and Ivey—to tell them that she had not been kidnapped and did not want to press charges against Merriman.)

Merriman was released from jail July 18, after Cantrell indicated that she did not wish to pursue prosecution. She did state her intent to obtain a restraining order to keep Merriman away. Merriman was never charged with any crime.

Merriman sued Walton, Marler, Humboldt County Sheriff Dave Renner, and Humboldt County, seeking compensatory and punitive damages. Merriman alleged a violation of 42 U.S.C. § 1983 (1982), claiming that his warrantless arrest was made without probable cause and that the county had a policy and custom of permitting unlawful arrests.

After seven months of discovery, all defendants moved for summary judgment under Fed.R.Civ.P. 56, arguing that the defendant officers had probable cause and, alternatively, that they reasonably belived that they had probable cause.

The district court denied the motion. The court characterized the question in terms of probable cause and an assertion of qualified immunity. The court found, without discussion of the facts, that the parties' papers demonstrated the existence of genuine issues of material fact.

Although orders denying summary judgment are generally not appealable, the denial of a claim of qualified immunity is an appealable "final decision" under 28 U.S.C. § 1291 (1982) to the extent that it turns on an issue of law. *See Mitchell v. Forsyth*, 472 U.S. 511, 528-30, 105 S.Ct. 2806, 2816-18, 86 L.Ed.2d 411 (1985); *White by White v. Pierce County*, 797 F.2d 812, 814-15 (9th Cir.1986).

Anderson v. Creighton, ____ U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), sets forth the inquiry concerning the existence of a clearly established right under the fourth amendment: "The relevant question in this case . . . is the objective (albeit

fact-specific) question whether a reasonable officer could have believed [the plaintiff's] warrantless [arrest] to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* 107 S.Ct. at 3040; *see also Tomer v. Gates*, 811 F.2d 1240, 1242 (9th Cir.1987) (*quoting Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir.1986)) (finding that an officer was entitled to qualified immunity if he "acted under an objectively '*reasonable* (even if mistaken) belief that what [he was doing] was lawful' ") (emphasis in original).

Thus, the question here is whether a reasonable police officer, knowing what Walton knew, could have believed there was probable cause for Merriman's warrantless arrest. We think the answer is no.

Probable cause is determined by applying a "totality-of-the-circumstances" analysis. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Probable cause requires "a probability or substantial chance of criminal activity." *Id*, at 243 n. 13, 103 S.Ct. at 2335 n. 13.

The information that Walton possessed at the time of Merriman's arrest was as follows: There was a report that Cantrell had been kidnapped, but since the time of that report, Walton had obtained additional information. Walton knew that the alleged victim of the kidnapping had returned. Walton knew that Merriman, the alleged perpetrator, was a local school teacher who was Cantrell's long-time boyfriend. Walton knew that Merriman had telephoned the police station and stated he was available for police questioning. When Walton contacted Merriman, Merriman was cooperative and volunteered his version of what had happened. Under these circumstances, there is no probable cause. A reasonable police officer would have made further inquiry before effecting a warrantless arrest.

The decision of the district court denying the defendants' motion for summary judgment based upon qualified immunity is affirmed.

AFFIRMED AND REMANDED.

Supreme Court, U.S.
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No. 88-1678

In The

Supreme Court of the United States

October Term, 1988

RICHARD WALTON,

Petitioner,

vs.

SCOTT B. MERRIMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND BRIEF OF AMICUS CURIAE

BERNARD C. DEPAOLI, Esq.
1018 Second Street
Eureka, CA 95501
(707) 443-6768

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Appellants complain that the issues before this Honorable Supreme Court are twofold:

1. "Whether the court below erred in analyzing an officer's qualified immunity by not considering any of the clearly established, factually similar federal or state law in effect on July 17, 1986, as required by *Anderson v. Creighton*, 483 U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), when it ruled that no reasonable police officer could have believed there was probably cause to effect a warrantless arrest after an eyewitness reported a kidnapping."

2. "Whether the court below erred by not considering all the information possessed by the arresting officer, as required by *Anderson*."

Respondent submits that the real issue is whether or not the United States Court of Appeals for the Ninth Circuit in *Merriman v. Walton*, a published case, erred in holding that the District Court's denial of petitioners/appellants' motion for summary judgment was proper.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND BRIEF OF AMICUS CURIAE

Respondent, Scott B. Merriman, respectfully requests this Honorable United States Supreme Court deny petitioner's petition for a writ of certiorari based upon the decision rendered in *Merriman v. Walton*, 856 F.2d 1333 (9th Cir. 1988), filed September 7, 1988.

OPINIONS BELOW

The United States District Court for the Northern District of California, the Honorable Samuel Conti, presiding, denied petitioner's motion for summary judgment in a written opinion. Upon appeal to the United States

Court of Appeals for the Ninth Circuit, the District Court's written opinion was affirmed with the reasons set forth in *Merriman v. Walton*, 856 F.2d 1333 (9th Cir. 1988).

JURISDICTION

The judgment of the court of Appeals for the Ninth Circuit was entered on September 7, 1988. After a petition for rehearing *en banc* was unanimously denied on January 13, 1989, petitioner, on the 90th day, filed their petition for a writ of certiorari before this Honorable Supreme Court alleging jurisdiction under 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Section 1983, states as follows:

> Section 1983. Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regualtion, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The United States Constitution, Amendment IV, states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

Scott B. Merriman, a 26 year old music teacher employed at Trinidad Elementary School in Trinidad, California, was arrested *without a warrant* by a Humboldt County Sheriff's Deputy for the very serious felony crime of kidnapping of his own girlfriend of two years on July 17, 1986. (The infamous Chowchilla kidnapping of elementary school children still lingers in the minds of most Californians to this date.) The warrantless arrest occurred some 17 hours after it was first reported and some 5 hours after the alleged girlfriend/victim had returned to her home safely. (CR 24)[1]

The sequence of events prefacing the warrantless arrest can be stated briefly:

A female acquaintance and apparently one-time friend of the alleged victim, Wendy Cantrell, who was the girlfriend of the respondent, after drinking with the alleged victim for most of the day on July 16, 1986, called

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[1] All citations are to the Clerk's Record before the Ninth Circuit Court of Appeals.

the victim's half-brother at approximately 11:00 p.m. on that same date and claimed that Wendy Cantrell had been abducted by Mr. Merriman (the alleged victim's boyfriend) some 5 hours earlier. (Id.) This reporting party was neither asked nor gave any explanation as to why she waited 5 hours before she reported this alleged semi-violent kidnap. (Id.) The report of the kidnap was taken telephonically from the half-brother of the alleged victim who was told that his half-sister was kidnapped by the girlfriend. (Id.) Neither the half-brother of the alleged victim nor the girlfriend who was the reported eyewitness to this event was personally interviewed or personally contacted by any member of law enforcement. (Id.)

According to the evidence presented to the District Court, as well as the United States Court of Appeals, the alleged kidnapping consisted of the boyfriend taking his girlfriend by the arm from the car of the intoxicated victim's friend at approximately 5:30 on the evening of July 16, 1986, and telling the friend that he was taking her to "the cabin". (Id.)

The information, afordescribed, was picked up by Deputy Richard Walton, a veteran and experienced Deputy Sheriff for the Humboldt County Sheriff's Department during the swingshift that he worked at the time which ended at 2:00 a.m. on the morning of July 17, 1986. (Id.) Neither he nor any other member of the Sheriff's Department attempted to seek an arrest warrant based on that information. (Id.) Nor did any Sheriff's Deputy or other officer attempt to contact the mother or the son of the victim at her regular place of residence. (Id.) Rather, an All-Points Bulletin was put out to all members of law

enforcement in Humboldt County. (Id.) Deputy Walton went home at the end of his shift. (Id.)

On the afternoon of July 17, 1986, the half-brother of the alleged victim reported that his half-sister had returned home and urged her to call the Sheriff's Department. (Id.) The alleged victim did call the Sheriff's Department and reported that she wished that no charges would be filed and stated that she might consider some sort of restraining order. She emphatically stated that no kidnapping or crime had occurred. (Id.)

Upon learning that the Sheriff's Department was looking for him, Mr. Merriman immediately telephoned the Sheriff's Department and told them that he would be available after work if they wanted to speak with him. (Id.) He told them where he would be. (Id.)

Even though no Deputy Sheriff sought to interview or contact in any way the alleged victim who had returned safely home, Deputy Walton, in spite of this knowledge, proceeded to the residence of Elaine Howell, an elderly lady who was a lifetime resident of Humboldt county and a long-time friend of Mr. Merriman. (Id.) He was accompanied by a member of the California Highway Patrol. (Id.) He asked Mrs. Howell if he could enter her residence and speak with Mr. Merriman at approximately 5:30 in the afternoon. (Id.) Mrs. Howell gave her permission and Deputy Walton entered the home where he asked Mr. Merriman a series of questions about the events of the preceding evening. (Id.) Mr. Merriman was cooperative, answered the questions, offered to take a lie detector test, and offered to help the officer find Wendy,

his girlfriend. (Id.) He emphatically denied any kidnapping of his own girlfriend and related to the officer how the excursion to the cabin was a preplanned date. (Id.) He also told the officer that his girlfriend very much wanted to leave the company of her girlfriend because of her intoxicated state and other belligerencies. (Id.)

Instead of seeking an arrest warrant or otherwise detaining Mr. Merriman, Deputy Walton arrested Mr. Merriman for the felony crime of kidnap and transported him to the Humboldt County jail where he was lodged in lieu of bail in the sum of $75,000.00. (Id.) On July 18, 1986, a private attorney retained by Mrs. Howell contacted the District Attorney's Office and explained to them what had happened. The Deputy District Attorney then ordered the Sheriff's Department to release Mr. Merriman and no charges have ever been filed. (Id.)

As noted by petitioner, Mr. Merriman ultimately brought his action for false arrest in the Federal Court which then resulted in petitioner vigorously pursuing a motion for summary judgment which was brief and denied. After extensive discovery as noted by the Court of Appeals for the Ninth Circuit, the denial of the motion for summary judgment was appealed, brief, and argued, resulting in a published decision filed September 7, 1988. (Id.)

ARGUMENT

THE COURT OF APPEALS FOR THE NINTH CIRCUIT, CONTRARY TO PETITIONER'S SUGGESTIONS, SPECIFICALLY CONSIDERED THE "CLEARLY ESTABLISHED LAW" AS SET FORTH IN *ANDERSON V. CREIGHTON*, WHEN IT RULED THAT WALTON WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

The Court of Appeals for the Ninth Circuit very specifically cited the test mandated by *Anderson v. Creighton*, 483 U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), stating as follows:

> "*Anderson v. Creighton*, 107 S.Ct. 3034 (1987), sets forth the inquiry concerning the existence of a clearly established right under the fourth amendment: 'The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable police officer could have believed [the plaintiff's] warrantless [arrest] to be lawful, in light of clearly established law and the information the searching officers possessed.' Id. at 3040; see also *Torner v. Gates*, 811 F.2d. 1240, 1242 (9th Cir. 1987) (quoting *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986)) (finding that an officer was entitled to qualified immunity if he 'acted under an objectively 'reasonable (even if mistaken) belief that what [he was doing] was lawful'."

The Court went on to note that the question in the instant case was:

> " . . . whether a reasonable police officer, knowing what Walton knew, could have believed there was probable cause for Merriman's warrantless arrest. We think the answer is no."

The Court then noted that probable cause is now determined by applying the "totality-of-the-circumstances" analysis required by *Illinois v. Gates*, 462 U.S. 213, 238 (1983)." *Illinois v. Gates, supra*, noted that probable cause requires "a probability or substantial chance of criminal activity." Id. at 243 n. 13.

Rightfully, an accurate and complete and believable statement by an eyewitness should, in some circumstances, be amply sufficient to provide probable cause for an arrest warrant and perhaps even a warrantless arrest. What petitioner argues for, however, is a statement by this Honorable United States Supreme Court of America that whenever a disgruntled person (who is never personally interviewed by law enforcement) claims that someone is kidnapped, then an officer can effect a warrantless arrest of a citizen of this country even though prior to effecting the arrest the arresting officer knows that the alleged victim has returned safely to his or her home and that the suspect has been fully cooperative in all regards. In other words, the petitioner urges that once one's neighbor, friend, or acquaintance, calls law enforcement and reports a crime the person that they are accusing can be arrested without a warrant even though in the intervening time period the officers did not take the opportunity to contact the alleged victim and did receive the full cooperation of the alleged perpetrator.

To sanction the arguments advanced by petitioner would mean that any United States citizen who, as Mr. Merriman, had a good reputation and was otherwise a responsible citizen, could be arrested without a warrant anytime someone, over the phone, reported that the citizen had committed a crime. Further, if this were indeed

the case, the innocent citizen would be deprived of any redress contrary to the provisions of Title 42, United States Code, Section 1983, if the arresting agency or officer claimed the defense of qualified immunity, even though the citizen's reputation as a school teacher, a minister, or any other reputable occupation was completely ruined. The aggrieved citizen's only remedy would be against the person who made the false report.

In short, if the petitioner's argument is to be sustained, then there is no meaning whatsoever to the "right of redress" guaranteed by 42 U.S.C., Section 1983.

In reaching their decision, the Ninth Circuit Court of Appeals unanimously acknowledged the mandates of this Honorable United States Supreme Court in its decision in *Anderson v. Creighton, supra*. It clearly considered the cases that dealt with probable cause to effect an arrest without a warrant. It clearly considered the rights of police officials to employ the defense of qualified immunity, and it clearly considered the fact that before any trial is had, "extensive discovery" should take place to determine whether or not a meritorious claim exists. What is so aptly realized, however, was the fact that no United States citizen should suffer from the stigma of a serious felony arrest based upon accusation alone. It further realized that the doctrine of "qualified immunity" and the cases that have interpreted its meaning do not provide law enforcement officers with a carte blanche arrest power based upon a mere accusation alone.

At the risk of sounding contrite, respondent suggests that it would be deplorable to immunize every officer from a lawsuit in spite of the provisions of Title 42,

Section 1983, where the officer arrested and incarcerated a boyfriend who did nothing more than take his girlfriend to a preplanned and predestined location over the objection of some complaining acquaintance of the girlfriend, especially when the officer had ample opportunity to interview all parties and to conduct a reasonable investigation in an effort to determine what the true facts were.

CONCLUSION

The Court of Appeals for the Ninth Circuit amply considered the "clearly established law". It properly refused to accord Deputy Walton the so-called "qualified immunity" defense when it concluded that, " . . . a reasonable police officer, knowing what Walton knew," would have effected a warrantless arrest. Thus, it is respectfully requested that petitioner's request of this Honorable United States Supreme Court for a writ of certiorari be denied.

Respectfully submitted,

BERNARD C. DEPAOLI, ESQ.
Attorney for Respondent

88-1678

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No. 88-

In The

SUPREME COURT OF THE UNITED STATES

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RICHARD WALTON,
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v.

SCOTT B. MERRIMAN
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

JOHN K. VAN DE KAMP
Attorney General
of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
HERBERT F. WILKINSON
Supervising Deputy Attorney General
CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

350 McAllister Street, Room 6000
San Francisco, California 94102
Telephone: (415) 557-0204

Attorneys for Amicus

QUESTION PRESENTED

Whether an arresting officer may be held personally liable in money damages for violating the Fourth Amendment standard of "probable cause" under circumstances in which the court that withholds qualified immunity cannot cite a single decision demonstrating a breach of "clearly established law."

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BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

California's interest in protecting our citizens from criminal violence by protecting our peace officers from personal liability arising from a reasonable decision to arrest brings the State before this Honorable Court as amicus curiae in support of Deputy Sheriff Richard Walton's petition for certiorari. This Court has recognized

that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . that in such cases those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable." (*Anderson* v. *Creighton*, 97 L.Ed.2d 523, 531 (1987).) Reasonableness, the margin for error necessary to induce officers to approach the limits of their authority, has been reduced to a razor's edge by the decision below.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit has held Deputy Sheriff Richard Walton personally liable in money damages for arresting Scott Merriman for kidnapping on the strength of a partially corroborated report of an identified, percipient, citizen informer. Although, as a matter of law, the totality of circumstances known to Walton furnished probable cause for Merriman's arrest, the Court of Appeals declared that no reasonable officer could have reached that conclusion. The Court of

Appeals cited no case law supporting its determination. To that extent, the opinion below indicates that the "probable cause" and "clearly established law" standards may coexist only at the cost of forcing peace officers to choose between dereliction of duty and money damages.

The Court of Appeals obscured its holding by reference to Deputy Walton's failure to obtain a warrant or to conduct a further investigation before the suspect's arrest. To that extent, Deputy Walton will not know why he has been held personally liable, the opinion below will not be understood by "reasonably well trained officers," and the "probable cause" rubric henceforth will encompass not only what an officer has learned but what he might have learned, as well as the practicability of obtaining a warrant. The law will have reached a level of complexity making personal liability unfair to officers required to act in the field.

ARGUMENT

AS A MATTER OF LAW, WALTON HAD PROBABLE CAUSE TO ARREST MERRIMAN

A. Reasons for Granting Certiorari

This case exposes serious obstacles to applying the "clearly established law" standard for qualified immunity to a peace officer's determination of probable cause to arrest.

First, this Court has defined "probable cause" as "a probability or substantial chance of criminal activity." (*Illinois* v. *Gates*, 462 U.S. 213, 243 fn. 13 (1983).) "[A]t this level of generality," however, the "probable cause" concept rarely furnishes sufficiently clear guidance that "a reasonable official would understand that what he is doing violates" the Fourth Amendment. (See *Anderson* v. *Creighton*, *supra*, 97 L.Ed.2d at 530-531.)

Second, rather than erecting a probability threshold for official action, "probable cause" balances competing interests in individual privacy and collective security. Thus, Mr. Justice Jackson explained that the constitutionality of a police detention might depend upon

whether its objective was apprehension of a kidnapper or a bootlegger. (*Brinegar* v. *United States,* 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).) Apart from the gravity of the suspected offense, judicial findings of "probable cause" may be informed by considerations other than probability such as the preference for warrants, discounted by the need for immediate action. (*United States* v. *Ventresca,* 380 U.S. 102 (1965); *United States* v. *Williams*, 622 F.2d 830, 842 (5th Cir. en banc 1980), *cert. denied*, 449 U.S. 1127 (1981).) The opinion below adds yet another factor: the opportunity for "further inquiry before effecting a warrantless arrest." (*Merriman* v. *Walton*, 856 F.2d 1333, 1335 (9th Cir. 1988).) From the field officer's perspective, "probable cause" in the abstract is at best a rubric, at worst a rationalization.

Third, proceeding from the abstract to the concrete often does little to aid a police officer's determination that the apparent circumstances do--or do not--constitute probable cause. Decisional law is of limited value to the officer's assessment because "there are so many variables

in the probable cause equation that one determination will seldom be a useful 'precedent' for another." (*Illinois* v. *Gates*, *supra*, 462 U.S. at 238 fn. 11.) "Each case is to be decided on its own facts and circumstances." (*Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).) For purposes of defining the scope of qualified immunity for police officers, the standards of "probable cause" and "clearly established law" are a bad fit.

Unlike the clearly articulated "bright line" rules set down in, for example, *United States* v. *Ross*, 456 U.S. 798 (1982) and *Duniway* v. *New York*, 442 U.S. 200 (1979), constitutional "standards," including "probable cause," require an exercise of judgment in addition to a knowledge of the law. Accordingly, if the standards of "probable cause" and "clearly established law" are to coexist without demanding that peace officers choose between dereliction of duty and money damages, courts cannot simply substitute their own judgment for that of officers acting in the field. Had the Ninth Circuit done no worse to Deputy Walton, the State of California, as

amicus, would urge plenary review on the grounds that qualified immunity permits police officers reasonable mistakes and that reasonableness imports a degree of judicial sensitivity to the complexity of a determination that now requires an officer to evaluate: what he already knows; what he might learn by further investigation; whether time permits additional inquiry; whether it is practicable to obtain an arrest warrant.

B. Reasons for Summary Reversal

In our view, however, the opinion below did not merely confuse constitutional "reasonableness" with "reasonableness" in the tort sense. (See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1348-1349 (2d Cir. 1972) (Lumbard, J., concurring) (*Bivens II*).) Instead, the Ninth Circuit held constitutional police conduct actionable; in other words, probable cause for Merriman's arrest existed as a matter of law. Consequently, the People of the State of California support petitioner's request for summary reversal.

We begin with the information known to Deputy Walton before Merriman's arrest. About 11:00 p.m. on July 16, 1986, William Ivey, half-brother of Wendy Cantrell, called the Sheriff to report Wendy's possible kidnapping. Deputy Walton responded to the Ivey residence. Ivey told Walton that Wendy's friend, Kim Martinez, had telephoned that Wendy's ex-boyfriend, Scott Merriman, had confronted the two women outside the Clam Beach Inn. Merriman then followed them to a location where he dragged Wendy Cantrell kicking and screaming from her vehicle into his automobile and drove away. Ms. Cantrell yelled to Ms. Martinez to call the police. Merriman told Martinez, "You can call whoever you want, I've got keys to the cabin and that's where I'm taking her." Within the hour, Martinez repeated her story to another member of the Sheriff's Office, who told Walton that the eyewitness had confirmed the abduction. (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1334; Pet. for Cert., p. 3.)

By 2:00 a.m. on July 17, 1986, Walton requested an all points bulletin because he could not locate Merriman or Cantrell and because he had found Merriman's residence unoccupied and his car missing. When Walton returned to duty at 4:00 p.m., he learned that Officer Kirkpatrick had been unable to find either Merriman or Cantrell that morning and that Merriman had contacted the Sheriff's Office to advise that he would be at home after 5:00 p.m. Not finding Merriman there, Walton went to Ivey's residence. Ivey informed the deputy that he had seen Wendy Cantrell at noon, that her face was cut above the eye and her nose was scratched, that she said she had spent the night at Elaine Howell's cabin, and that she told Ivey she had been "messed up on booze and drugs" and could not remember what had happened. Cantrell left at about 2:00 p.m. without telling Ivey where she was going. (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1334; Pet. for Cert., p. 4.)

Deputy Walton found Merriman at the Howell residence. Merriman admitted following Cantrell and

Martinez from the Clam Beach Inn and taking Cantrell in his car to a house near the Howell residence, where the two spent the night. Merriman denied forcing Cantrell to accompany him and claimed Cantrell and Martinez had been fighting. Walton arrested Merriman. At her deposition, Cantrell stated that she had telephoned the Sheriff's Office about 2:00 p.m. on July 17, 1986 explaining that she had not been kidnapped but would seek a restraining order to keep Merriman away. Detective Vulich of the Sheriff's Office said he received such a call from Cantrell at 3:25 p.m. on the following day, July 18, 1986. In any event, Walton was not shown to have learned of Cantrell's call before arresting Merriman. (*Ibid.*)

When the informer is an identified citizen who witnessed the crime, reliability may be presumed. (See *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975) and cases cited therein.) Martinez's information that Cantrell had been forcibly abducted was corroborated by Cantrell's absence during the night of July 16, 1986, by her

half-brother's report of her subsequent injuries, and to an extent by Merriman's admissions to Walton. Probable cause existed as a matter of law unless Walton was required to discredit Martinez on the basis of Merriman's denial of force and explanation that Cantrell and Martinez had fought. (Cf. *Clay* v. *Conlee,* 815 F.2d 1164, 1168 (8th Cir. 1987).) Considering that Martinez had immediately brought Cantrell's predicament to the attention of Ivey, and had repeated her accusation to the Sheriff's Office at the risk of civil and criminal liability, and that Merriman's self-serving explanation was made in an accusatory setting after Merriman had ample time to reflect on his situation, it was not unreasonable for Walton to find Martinez more credible than Merriman.

The Ninth Circuit reached a contrary conclusion because "Walton knew the alleged victim of the kidnapping had returned. Walton knew that Merriman, the alleged perpetrator, was a local school teacher who was Cantrell's long-time boyfriend. Walton knew that Merriman had telephoned the police station and stated he

was available for police questioning . . . [and] wa cooperative and volunteered his version of wha happened. . . . A reasonable police officer would hav made further inquiry before effecting a warrantless arrest (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1335.)

That Wendy Cantrell returned did not mean tha she had not been forcibly abducted. Equally important t any officer familiar with domestic disputes, so long as bot Merriman and Cantrell were at large there remained th danger of additional violence. (See *Balistreri* v. *Pacific Police Dept.*, 855 F.2d 1421, 1426-1427 (9th Cir. 198 (police had duty to protect abused wife from husband) Petitioner points out that Merriman had been describe by Martinez as Cantrell's "ex-boyfriend" and that "there no evidence Deputy Walton knew Merriman wa 'Cantrell's long-time boyfriend. . . .' Further, there is n evidence Deputy Walton knew Merriman was 'a loca school teacher. . . .' In fact, Merriman admitted at h deposition that he had no teaching credential and that h quit his teaching job in February 1985." (Pet. for Cert.,

10 fn. 7.) It is true that Merriman, obviously aware that the police were looking for him, called the authorities in order to "volunteer" his essentially exculpatory version of the relevant events. Were a suspect's denial to foreclose probable cause, it would be difficult to arrest anyone. *Amicus* finds Merriman's denial, emphasized below, far less probative than Cantrell's injuries, ignored below.

Particularly troubling are the implications of the penultimate sentence of the Court of Appeals' opinion: "A reasonable officer would have made further inquiry before effecting a warrantless arrest." (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1335.) Considering that the Sheriff's Office had talked with the victim's brother, the percipient witness, and the suspect, and that the victim's present location was unknown, of whom should Deputy Walton have made further inquiry? How long was the deputy constitutionally required to await the victim's reappearance? Is the "probable cause" requirement an appropriate vehicle for judicial control of the scope of a police investigation? Can police reasonably be expected

to enter into their probable cause calculation what they might be able to learn as well as what they have learned?

Does the Ninth Circuit imply that had a magistrate issued an arrest warrant based on all information known to Deputy Walton, Merriman's arrest would have been lawful, or only that Walton would not be personally liable? Is Walton held liable because: (a) he lacked probable cause; (b) he failed to seek an arrest warrant; (c) he failed to make further investigation; (d) all of the above? Will a "reasonably well trained officer" reading the opinion below understand where Deputy Walton went astray? (See *United States* v. *Leon*, 468 U.S. 897, 922 fn. 23 (1984).)

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CONCLUSION

The People of the State of California respectfully urge that Deputy Walton's petition for writ of certiorari be granted and that the judgment of the Court of Appeals be summarily reversed on the ground that, as a matter of law, there existed probable cause for Merriman's arrest.

DATED: May 4, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
of the State of California

RICHARD B. IGLEHART,
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

HERBERT F. WILKINSON
Supervising Deputy Attorney General

CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

Attorneys for Amicus

CKT:ds

CERTIFICATE OF SERVICE BY MAIL

No. 88-

RICHARD WALTON,
Petitioner,

v.

SCOTT B. MERRIMAN
Respondent.

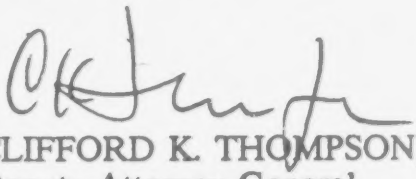
CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 350 McAllister Street, Room 6000, in the City and County of San Francisco, State of California; that on May 9, 1989, he served true copies of the attached Brief for the People of the State of California as Amicus Curiae in the above-entitled matter on counsel for respondent and petitioner by placing same in envelopes addressed as follows:

Dale A. Reinholtsen, Esq.
John M. Vrieze, Esq.
Mitchell, Dedekam & Angell
P. O. Box 1001
814 Seventh Street
Eureka, California 95501
Attorneys for Petitioner

Bernard C. DePaoli, Esq.
1018 Second Street
Eureka, California 95501
Attorney for Respondent

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.



CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1678

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

RICHARD WALTON,
Petitioner,

VS.

SCOTT B. MERRIMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

DALE A. REINHOLTSEN, ESQ.*
JOHN M. VRIEZE, ESQ.
MITCHELL, DEDEKAM & ANGELL
P.O. Drawer 1008
814 Seventh Street
Eureka, California 95502
(707) 443-5643
Attorneys for Petitioner

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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RICHARD WALTON,
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PETITIONER'S REPLY BRIEF

I

RESPONDENT IS UNABLE TO DEMONSTRATE THAT DEPUTY WALTON VIOLATED ANY "CLEARLY ESTABLISHED LAW" AT THE TIME OF THE ARREST, AND RESPONDENT MISSTATES THE RECORD OF THE CASE IN HIS OPPOSITION TO DEPUTY WALTON'S PETITION FOR WRIT OF CERTIORARI

In his opposing brief in No. 88-1678, respondent is unable to cite a single decision or statute demonstrating the breach of a "clearly established law," to support the opinion of the Ninth Circuit Court of Appeals. Respondent boldly asserts that the Ninth Circuit "amply considered the 'clearly established law,' " without any explanation as to the law purportedly considered.

Further, respondent's argumentative review of the facts misstates the record of the case. The most substantial misstatements will be addressed below.

First, despite respondent's own deposition testimony to the contrary (Pet. for Cert., p. 10, fn. 7), respondent begins his brief by claiming he was a teacher when arrested. The Ninth Circuit Court of Appeals incorrectly recited this fact, and respondent continues to inaccurately report his employment situation, apparently in an attempt to bolster his own credibility.

More significantly, respondent states, "Neither the half brother of the alleged victim nor the girlfriend who was the reported eyewitness to the event was personally interviewed or personally contacted by any member of law enforcement." (Res. Br. in Opp., p. 4.) In fact, Deputy Walton personally interviewed Mr. Ivey on two occasions, first soon after Mr. Ivey reported the abduction on the evening of July 16, 1986, and then again on the afternoon of July 17, 1986, when Mr. Ivey reported he observed a cut over Ms. Cantrell's eye and a scratch on her nose when she briefly returned home that day. (CR 24) While Deputy Walton had been dispatched to interview Mr. Ivey, Sergeant Marler established telephone contact with Ms. Martinez, less than one hour after Mr. Ivey's telephone call to the Sheriff's Department, and the information that Ms. Martinez confirmed the abduction was relayed to Deputy Walton while he was still in the field. (CR 23; CR 24)

Respondent attempts to imply that Ms. Martinez was an unreliable witness, by reference to the fact that Ms. Cantrell and Ms. Martinez were drinking prior to the incident. In a declaration signed May 27, 1987, Ms. Martinez states, "I had a couple of drinks, but did not feel intoxicated and had no difficulty perceiving events that night or recalling those events." (CR 22) In addition to verifying the kidnapping in the foregoing declaration, which was signed under penalty of perjury, Ms. Martinez confirmed her story when deposed on May 29, 1987. (CR 40)

Mr. Merriman testified at deposition that Ms. Martinez was "coherent" and that both Ms. Cantrell and Ms. Martinez were not "overly intoxicated" when he saw them at the Clam Beach Inn. (CR 42, p. 83, lns. 13-17) Sergeant Marler stated in a signed

declaration that Ms. Martinez "did not mumble, did not sound intoxicated" when he spoke with her, and he had no reason to doubt the truthfulness of her report of the incident. (CR 23) In summary, there are no facts to show Ms. Martinez was an unreliable eyewitness to the abduction, especially when she has maintained her version twice while under oath.

Respondent claims the abduction occurred some five hours before Mr. Ivey's 11:00 p.m. call to the Sheriff's Department. (Res. Br. in Opp., p. 4) Respondent's factual basis for this claim is not stated.[1] Ms. Martinez told Sergeant Marler that the Clam Beach abduction occurred at "approximately 2100 hours," about two hours before Mr. Ivey called the Sheriff's Department. (CR 23) Given the period of time needed for Ms. Martinez to return home to Arcata, California, and then to convey the whole incident to Mr. Ivey, who then called the Sheriff's Department, there is nothing unusual about this time lag.

Respondent also states the victim returned home "safely." (Res. Br. in Opp., p. 5) Webster's Ninth New Collegiate Dictionary (1987) variously defines the word "safely" as "healthy" or "unhurt." The fact that Ms. Cantrell returned home with a cut above her eye and her nose scratched, a matter ignored in Respondent's Brief, raises the question as to whether Ms. Cantrell truly returned home "safely."

Lastly, respondent also claims Ms. Cantrell called the Sheriff's Department on July 17, 1986, and "emphatically stated that no kidnapping had occurred." (Res. Br. in Opp., p. 5) As petitioner has already indicated (Pet. for Cert., p. 4), the records from the

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[1] All citations in Respondent's Brief in Opposition refer to CR 24. This citation is to the Declaration of Deputy Walton, which has some of the investigative reports attached as exhibits. Many other facts in Respondent's Brief are also not supported by reference to this citation. The grossest inaccuracy is the use of this citation to support the claim Ms. Cantrell contacted the Sheriff's Department on July 17, 1986. CR 24 also makes no reference to drinking by anyone and there is no competent evidence anywhere in the record to establish that the District Attorney's Office advised that Mr. Merriman be released at the urging of Ms. Howell.

Sheriff's Department show that this call was made July 18, 1986, and there are no facts to establish Deputy Walton knew of this call before Merriman's arrest, if it in fact so occurred. The report of Detective Vulich shows something other than an emphatic denial by Ms. Cantrell. In pertinent part, the report reads as follows:

> "On 7-18-86, I received and reviewed this case.
>
> "I called for Ms. Cantrell, 677-3700, but there was no answer, 1500 hours.
>
> "I then called W #1 Martinez and inquired as to Ms. Cantrell (sic) whereabouts and welfare. She said she talked with V Cantrell's brother, Bill, last night who told her V Cantrell was home and okay. I request (sic) W Martinez attempt to contact V Cantrell and have her contact me.
>
> "At about 1525 hrs., V Cantrell called me. When asked, she said she was okay. She said that she 'did not want to pursue prosecution' and that 'she was going to get a restraining' (sic) to keep S Merriman away from her." (CR 25)

II

CONCLUSION

The record in this case demonstrates there is no material dispute as to the facts available to Deputy Walton at the time he arrested Mr. Merriman. The arrest was founded upon the eyewitness reports of Ms. Martinez and Mr. Ivey, following a thorough investigation. Based on the "clearly established law" at the time of the arrest, Deputy Walton had probable cause to arrest Mr. Merriman. Probable cause was not vitiated simply because Mr. Merriman denied the abduction when confronted by the officer. (Cf. *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194 (7th Cir. 1985).)[2]

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[2] *Rodgers* involved the appeal of a dismissal under Rule 12(b)(6) to a 42 U.S.C. § 1983 claim based on unlawful arrest. In *Rodgers*, at 200-201, the court stated, "Pagano [the arresting officer] was confronted by two Lincoln Towing employees who steadfastly maintained they had

As this Honorable Court has stated, [t]he Constitution does not guarantee that only the guilty will be arrested." (*Baker v. McCollum*, 443 U.S. 137, 99 S.Ct. 2689, 4 L.Ed.2d 433 (1979).) "If it did, Section 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." (*Id.*)

Based upon all the foregoing, petitioner respectfully urges that Deputy Walton had probable cause for Merriman's arrest, that Deputy Walton's Petition for Writ of Certiorari be granted, and that the Court of Appeals be summarily reversed.

Respectfully submitted,

MITCHELL, DEDEKAM & ANGELL

By JOHN M. VRIEZE, ESQ.
DALE A. REINHOLTSEN, ESQ.
Attorneys for Petitioner

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seen Rodgers throw the paint on the building, and by Rodgers, who maintained his innocence. We cannot fault Pagano for believing Mash and Eisgrau over Rodgers, even though it turned out that Mash and Eisgrau may have been lying. Apart from the conclusion that Pagano 'knew' Mash and Eisgrau were lying, Rodgers has not alleged a single fact that would indicate Pagano thought Rodgers was innocent. Evidently nothing occurred that would suggest that the two employees might be lying."